

Attorney Docket No. 27037 / PE0850

THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re patent application of:

Dilson Ferreira da LUZ

Confirmation No. 2219

Serial No. 10/553,187

Group Art Unit: 3731

Filed: October 13, 2005

Examiner: David C. Eastwood

For: **SURGICAL DEVICE AND METHOD FOR CUTANEOUS  
DETACHMENT OF SKIN**

**PRE-APPEAL REQUEST FOR REVIEW**

**Mail Stop AF**

P.O. Box 1450

Commissioner for Patents

Alexandria, VA 22313-1450

Dear Commissioner:

In response to the Final Office Action mailed September 15, 2009 ("Office Action"), the period for response extending through March 15, 2010 with the concurrently-submitted fee and petition for a three-month extension of time, Appellant requests a pre-appeal brief review of the pending rejections. For at least the reasons discussed below, Appellant respectfully submits that the rejection of claims 17 – 20 should be reversed.

***I. Claim 17***

Independent claim 17 stands rejected under 35 U.S.C. §103(a) as allegedly unpatentable over McCurdy in view of Toledo, Zucherman, and Stevenson. Appellant respectfully disagrees.

**The improper combination of McCurdy and Toledo**

Claim 17 recites, in part, performing "incisions of approximately 2.5 centimeters." The Office Action admits at page 3 that McCurdy fails to disclose this feature, and cites to Toledo as

allegedly making up for the noted shortcoming in McCurdy. As stated on page 3 of the Office Action, however, Toledo only teaches making a 2 centimeter incision, which is smaller than the 2.5 centimeter incision recited in step d. In spite of this, the Office Action states that it would have been obvious to one skilled in the art “to modify the invention of McCurdy with the smaller incisions as disclosed by Toledo.” Office Action at pages 3 – 4 (emphasis added). Since Toledo expressly discloses that one of the goals of its procedure is to reduce scarring (Toledo Discussion at 151), Toledo teaches away from making the larger incision recited in claim 17. Thus, Toledo fails to teach or suggest “incisions of approximately 2.5 centimeters.”

The remaining references are cited as allegedly teaching other features of claim 17, but not for teaching “incisions of approximately 2.5 centimeters.” Thus, a person of ordinary skill in the relevant field would not have been prompted to combine Toledo with McCurdy to achieve the incision recited in claim 17. For at least this reason, Appellant respectfully submits that claim 17 is allowable, and requests that the rejection under 35 U.S.C. §103(a) be reversed.

The improper combination of McCurdy and Zucherman

Claim 17 further recites in part “passing a succession of remaining surgical devices by increasing order of thickness until achieving a desired cutaneous detachment, and thereby completing the cutaneous displacement of the portion of the face.” The Office Action acknowledges that McCurdy fails to disclose this feature, and cites to Zucherman as allegedly making up for this shortcoming in McCurdy. Specifically, the Office Action states at page 4 that it would be obvious to modify the invention of McCurdy with the dilator set as disclosed by Zucherman. Office Action at 4.

Appellant respectfully disagrees. Zucherman does not describe a cutaneous detachment procedure, does not include passing a surgical face detachment device through a facial area, does not describe using a succession of devices of increasing order of thickness until achieving a desired cutaneous detachment, and does not suggest cutaneous displacement of the portion of the face.

Rather than teaching an instrument for detaching skin, Zucherman teaches creating and dilating an opening in the interspinous ligament. Zucherman at [0009] (emphasis added). The Zucherman dilator 100 is exclusively designed for surgeries in small areas of the backbone, as seen by the short length and shape of the working portion of the Zucherman dilator 100. Only tip 106 is inserted into a patient, and is only inserted from first end 110 to second end 108. Zucherman at [0013]. The openings made by the Zucherman devices are also ten times smaller than the incisions recited in the claims, with nothing suggesting that the dilator disclosed in Zucherman would be used for cutaneous detachment, especially incisions of the size recited in the claims. Thus, Zucherman fails to make up for the acknowledged deficiency of McCurdy.

The remaining references are cited as allegedly teaching other features of claim 17, but not for teaching “passing a succession of remaining surgical devices by increasing order of thickness until achieving a desired cutaneous detachment, and thereby completing the cutaneous displacement of the portion of the face.” Accordingly, one of skill in the art would not be motivated to combine Zucherman with either McCurdy or any of the other cited references achieve the claimed subject matter. Accordingly, Appellant respectfully submits that claim 17 is allowable, and requests that the rejection under 35 U.S.C. §103(a) be reversed.

## ***II. Claim 18***

Dependent claim 18 also stands rejected under 35 U.S.C. §103(a) as allegedly unpatentable over McCurdy in view of Toledo, Zucherman, and Stevenson. While Appellant submits that claim 18 is allowable at least for its dependence from allowable claim 17, Appellant submits that claim 18 is allowable for the following additional reasons.

### **The improper use of Official Notice**

The Office also asserts without citing to anything on the record that it would have been obvious that the dilation method of claim 18 would thereby:

launch a migration of blood platelets to the injured area, followed by formation of blood clots retained within the vascular extremities, which were subjected to progressive stretching with substantial tapering of their lumens prior to sectioning, thereby obtaining the incarceration of the clots in the extremities of the sectioned vessels and reducing blood flow. Office Action at 4.

Appellant respectfully submits that since the Office Action fails to cite to anything on the record to support this assertion, the assertion should be deemed an improper use of Official Notice.

As stated in MPEP §2144.03, it is “not [] appropriate for the examiner to take official notice of facts without citing a prior art reference where the facts asserted to be well known are not capable of instant and unquestionable demonstration as being well-known.” Accordingly, the rejection of claim 18 is improper and should be reversed.

## ***III. Claims 19 and 20***

Appellant respectfully submits that claims 19 and 20 are allowable at least because they depend from allowable claim 17. Appellant further submits that claims 19 and 20 are also allowable because of their dependency from allowable claim 18. For at least these reasons,

Appellant respectfully submits that the rejection of claims 19 and 20 under 35 U.S.C. §103(a) should be reversed.

**CONCLUSION**

Appellant believes that a full and complete response has been made to the pending Office Action and respectfully submits that all of the stated grounds for rejection have been overcome or rendered moot. Accordingly, Appellant respectfully submits that the pending claims are allowable and all rejections should be reversed.

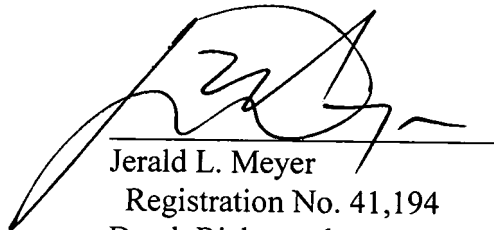
Should the Examiner feel that there are any issues outstanding after consideration of this response, the Examiner is invited to contact Appellant's undersigned representative at the number below to expedite prosecution.

Prompt and favorable consideration of this Reply is respectfully requested.

March 15, 2010

**THE NATH LAW GROUP**  
112 South West Street  
Alexandria, VA 22314-2891  
Tel: 703-548-6284  
Fax: 703-683-8396

Respectfully submitted,  
**THE NATH LAW GROUP**

A handwritten signature in black ink, appearing to be "J. Meyer", written over a horizontal line.

Jerald L. Meyer  
Registration No. 41,194  
Derek Richmond  
Registration No. 45,771  
Robert T. Burns  
Registration No. 60,545  
**Customer No. 20529**